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No. 85-140

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,
Petitioner,

v.

MICHAEL HARDWICK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

BRIEF FOR RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

At issue in this case is whether the State of Georgia may send its police into private bedrooms to arrest adults for engaging in consensual, noncommercial sexual acts, with no justification beyond the assertion that those acts are immoral. On August 3, 1982, Georgia exercised this "police power" over personal morality by arresting 29-year-old Respondent Michael Hardwick in his own bedroom, and charging him with committing the crime of "sodomy" with another consenting adult in that very room. The crime of "sodomy," punishable by imprisonment for up to twenty years, is defined by Georgia law as "any sexual act involving the sex organs of one person and

the mouth or anus of another." Official Code of Georgia Annotated ("O.C.G.A.") Section 16-6-2 (1984).[1] The statute applies to all persons, whether married or single, heterosexual or homosexual, and to all the described acts, even when conducted in private between consenting adults.[2]

Hardwick has as yet had no chance to challenge the constitutional validity of the statute in a state criminal proceeding, because the State has thus far declined to present his case to a grand jury. Jt.App. 8.[3] But pursuant to the Georgia four-year statute of limitations for felonies of this sort, O.C.G.A. Section 17-3-1(c), Hardwick remains subject to prosecution for the charged offense.

Hardwick therefore filed suit in the Northern District of Georgia on February 14, 1983. His complaint sought a declaratory judgment that the Georgia sodomy law is unconstitutional as applied to private sexual conduct between consenting adults. Jt.App. 6-7.

Rather than denying any of Hardwick's allegations, defendants moved to dismiss under Fed.R.Civ.P. 12(b)(6). The district court ruled that Hardwick had standing, but disposed of his constitutional claims in two sentences, by the citation, without more, of this Court's summary affirmance in *Doe* v. *Commonwealth's Attorney*, 403 F.Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976). App. 2-3.

[1] Section 16-6-2 was challenged below only insofar as it criminalizes private, consensual adult sodomy. *See* Jt.App. 6 (Complaint, ¶ 17). Not at issue in this case, of course, is that part of Section 16-6-2 criminalizing sodomy by force as "aggravated sodomy." Hereafter, only the challenged part of Section 16-6-2 will be meant when the term "Section 16-6-2" is used, unless otherwise noted.

[2] Although the State of Georgia in its brief defends the statute only insofar as it criminalizes "*homosexual* sodomy," *see, e.g.*, Brief of Petitioner at 20, 21, 23, 24, 25, 26, 27, 29, 34, 36, 37, 38 (emphasis added), the statute is in no way so limited. Indeed, Georgia is among the 19 states that outlaw *all* acts of "sodomy," in contrast to the handful of jurisdictions that criminalize only homosexual acts, *see* Ark. Stat. Section 41-1813; Kan. Stat. Section 21-3505; Mont. Rev. Code Section 94-5-505; Nev. Rev. Stat. Section 201.190; Tex. Penal Code Section 21.06.

[3] References to the Joint Appendix will be styled "Jt.App. ____." References to the Appendix to the Petition for Certiorari will be styled "App. ____."

The Court of Appeals for the Eleventh Circuit reversed the district court's dismissal, holding that the statute implicates fundamental constitutional rights by regulating citizens' conduct in their own bedrooms, and involves none of the "public ramifications" that attend "sexual activity with children or with persons who are coerced either through physical force or commercial inducement." App. 26. Indeed, the court held, "[t]he activity [Hardwick] hopes to engage in is quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation." *Id.*

Even so, the Court of Appeals did not declare the statute unconstitutional or enjoin its enforcement. It merely remanded for a trial and directed that, because state invasion of the home to regulate such private intimacies is constitutionally troublesome, "the State must demonstrate a compelling interest in restricting this right[,] and must show that the sodomy statute is a properly restrained method of safeguarding its interests." App. 22. Nor, as the court below ruled after careful examination of this Court's precedents, did this Court's summary action in *Doe* v. *Commonwealth's Attorney* preclude that standard of review upon remand. App. 12-21.[4] Thus all that is at

[4]Regardless of whether the lower court was correct in the significance it attributed to the summary affirmance in *Doe*, such a disposition is, of course, not binding on this Court once it has granted plenary review. *Hicks* v. *Miranda*, 422 U.S. 332, 344-45 (1975). The Eleventh Circuit did, however, seek respectfully to abide by the ruling in *Doe* as it understood it. And since the plaintiff in *Doe* contended only that his awareness of the Virginia sodomy law had a "chilling effect" on his social life, *see* Jurisdictional Statement in *Doe*, No. 75-896 at 4, this Court's summary affirmance in that case could well have rested, as the Eleventh Circuit concluded, solely on the plaintiff's lack of standing. *See, e.g., Pressler* v. *Blumenthal*, 434 U.S. 1028, 1028-29 (1978) (Rehnquist, J., concurring) ("[summary] affirmance does not necessarily reflect this Court's agreement with the conclusion reached by the District Court on the merits . . . . Our 'unexplicated affirmance' without opinion could rest as readily on our conclusion that appellant lacked standing to litigate the merits"); *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Brandeis, J.,

issue here is the appropriate standard of review, not the validity of the statute.

SUMMARY OF ARGUMENT

The State of Georgia would extend its criminal law into the very bedrooms of its citizens, to break up even wholly consensual, noncommercial sexual relations between willing adults. And the State contends before this Court that it may freely do so without giving any good reason. All that Respondent argues is that a Georgia citizen is entitled by the Constitution to demand not only a warrant of the Georgia police officer who would enter his bedroom, but also a substantial justification of the Georgia legislature when it declares criminal the consensual intimacies he chooses to engage in there.

No less justification is acceptable in a society whose constitutional traditions have always placed the highest value upon the sanctity of the home against governmental intrusion or control. Nor is the mere invocation of contestable moral views sufficient to defend a law that so thoroughly invades individuals' most intimate affairs.

Thus the law challenged here must be subjected to heightened scrutiny, and it may be upheld upon remand *only* if the State of Georgia offers a far more powerful justification than the one it has offered here: namely, the tautology that the State has criminalized the private acts at issue because a majority of Georgia's legislators disapprove of them.

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concurring) (if plaintiffs lack standing, the Court should affirm the lower court's decision against plaintiffs "without passing upon it"); *Fusari* v. *Steinberg*, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring) (a summary disposition "affirms the judgment but not necessarily the reasoning by which it was reached").

ARGUMENT

In Section 16-6-2, the State of Georgia has criminalized certain sexual activities defined solely by the parts of the body they involve, no matter who engages in them, with whom, or where. Georgia threatens to punish these activities with imprisonment even if engaged in by two willing adults — whether married or unmarried, heterosexual or homosexual — who have secluded themselves behind closed bedroom doors in their own home, as Michael Hardwick did.[5] All that is at issue in this case is whether a state must have a substantial justification when it reaches that far into so private a realm.

The Eleventh Circuit held only that the Constitution indeed requires such heightened scrutiny for a law like the one challenged here. That court never reached the question whether the State might be able to meet such a standard, nor has the State yet had any opportunity in this case to try to do so. The Eleventh Circuit simply ruled that, because Section 16-6-2 criminalizes activity that is "quintessentially private and lies at the heart of an intimate association," the district court's dismissal of the complaint must be reversed, and the case remanded for a trial at which "the State must prove, in order to prevail, that it has a compelling interest in regulating this behavior and this statute is the most narrowly drawn means of safeguarding that interest." App. 26.

The State of Georgia urges this Court to overturn that ruling and declare that a law reaching into the bedroom to regulate

[5] Respondent Hardwick's standing to challenge Section 16-6-2 is indisputable. He is subject to prosecution even now for the private conduct that led to his arrest in his bedroom on August 3, 1982, because Georgia's four-year statute of limitations applies to his "crime." O.C.G.A. Section 17-3-1(c). And it was uncontested in the courts below that the State intends to continue to enforce Section 16-6-2 against such conduct, and that Hardwick intends to continue to violate the statute. *See* App. 9, 11; *id.* at 27 (Kravitch, J., concurring as to Hardwick's standing).

intimate sexual conduct is to be tested by no stricter a standard than a law that regulates the community environment outside the home: namely, a standard of minimal scrutiny. In the State's view, the most private intimacies may thus be treated as public displays, and the sanctum of home and bedroom merged into the stream of commerce — all subject to regulation whenever there is any conceivable "rational relationship" to the promotion of "traditional" or "prevailing" notions of "morality and decency."[6]

But our constitutional tradition does not permit such casual state control of our most private realm. Rather, this Court's precedents direct that the intrusion of Georgia's criminal law into the intimate, consensual activities proscribed by Section 16-6-2 be examined more carefully than the State would have it. The statute should be tested for a close relationship to a compelling state interest, as required by the court below. *See* App. 22, 26. But even if this Court should deem such scrutiny too strict, the statute should *at the very least* be tested for a "fair and substantial relation" to a legitimate governmental objective. *See, e.g., Zablocki* v. *Redhail*, 434 U.S. 374, 400, 402 (1978) (Powell, J., concurring in judgment).[7] For the State has sought through that statute to control an area of life so removed from the public sphere that "the mere [invocation] . . . [of] the controversial realm of morals cannot [suffice as] justif[ication]." *See Poe* v. *Ullman*, 367 U.S. 497, 545 (1961) (Harlan, J., dissenting).

[6] Brief of Petitioner at 34-35.

[7] Whichever of these standards of review — the strict or the intermediate — is adopted here, the *judgment* of the court below must be affirmed, for it simply reversed the district court's flat dismissal of the complaint.

I. SECTION 16-6-2's SWEEPING CRIMINALIZATION OF INTIMATE SEXUAL CONDUCT IN THE PRIVACY OF THE HOME REQUIRES SPECIAL JUSTIFICATION.

This case involves a claim of constitutional protection for the associational intimacies of private life in the sanctuary of the home.[8] This Court has long held that special justification is required when a State would seek to invade *either* the zone of privacy *or* the boundaries of the home; this case involves *both*. This case is thus about the very core of that "most comprehensive of rights and the right most valued by civilized man," namely, "as against the Government, the right to be let alone." *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

The State of Georgia fully concedes, as it must, that this right is protected by the Constitution.[9] Georgia argues merely that the concerns Respondent invokes are not sufficiently "rooted in the traditions and moral values of our people" to be embraced by that constitutional right.[10] There the State is wrong, for those concerns are so rooted, and deeply so.

As the State would have it, this Court should forever freeze the right to be let alone by government within the precise facts of a few selected precedents — those which Georgia describes as involving "activities relating to marriage," "decisions relating to whether to conceive or bear a child," "child rearing and education," and nothing more.[11] The State thus wholly ignores

[8] No claim of special protection is made here for all activities that may be deemed "intimate," nor for all activities that may seek shelter inside the four walls of a private home. *See* section II *infra*.

[9] *See* Brief of Petitioner at 18 ("That there exists a right of personal privacy under the Constitution is not questioned by Petitioner"); *id.* at 39 ("Petitioner does not dispute this Court's power to define emerging rights under the Fourteenth Amendment or the Ninth Amendment").

[10] Brief of Petitioner at 39.

[11] Brief of Petitioner at 19; *see also id.* at 25.

this Court's long tradition of sensitivity to government intrusions into intimacy and the home, *independent* of its concerns for family integrity.[12] Moreover, the State wrongly supposes that it is the facts alone of prior cases that matter, and not their underlying principles. This Court, by contrast, has refused to cut off constitutional protection "at the first convenient, if arbitrary boundary" drawn by its prior cases, properly preferring to focus on "the *basic reasons why* certain rights . . . have been accorded shelter under the Fourteenth Amendment's Due Process Clause." *Moore* v. *City of East Cleveland*, 431 U.S. 494, 502, 501 (1977) (plurality opinion) (emphasis added). Accordingly, our tradition of liberty under the Due Process Clause has never "been reduced to any formula" nor "determined by reference to any code," *Poe* v. *Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting),[13] but rather has been "a living thing," *id.* at 542, that must grow and change over time within careful limits sketched by "solid recognition of the basic values that underlie our society," *Moore* v. *City of East Cleveland*, 431 U.S. at 503 (plurality opinion) (citing *Griswold* v. *Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)).[14]

[12] *See* sections I.A and I.B *infra*.

[13] *See also Rochin* v. *California*, 342 U.S. 165, 169 (1952) (Frankfurter, J.) ("In dealing not with the machinery of government but with human rights, the absence of formal exactitude or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions"); *Nat'l Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting) ("[g]reat concepts like . . . 'liberty' . . . were purposely left to gather meaning from experience[,] [f]or . . . only a stagnant society remains unchanged"); *Carey* v. *Population Services Int'l*, 431 U.S. 678, 684 (1977) (Brennan, J.) ("the outer limits of . . . privacy have not been marked by the Court").

[14] It is for just this reason that Justice Harlan, in *Poe*, wrote that the "general public opinion . . . of a bygone day" condemning contraceptives, 367 U.S. at 546-47 & n.12, could not justify the criminalization of their use. Likewise,

Respondent Hardwick seeks only such solid recognition of those basic values here. He invokes a tradition that is not static, but that evolves by "build[ing] on what has survived," *Poe* v. *Ullman*, 367 U.S. at 542 (Harlan, J., dissenting). Central to that tradition are values of intimate association, and of the sanctity of the home. Each of those values warrants independent constitutional protection. But their *intersection* in this case requires that government give especially substantial justification to the individual whose personal dwelling it would enter in order to control the consensual intimacies of his or her private adult life.

A. Ordered Liberty Requires That Intimate Relationships Between Consenting Adults Be Free From Unjustified State Intrusion.

The State of Georgia asserts that it may extend the arm of the criminal law into "the most intimate" of human relationships, *Roberts* v. *United States Jaycees*, 104 S.Ct. 3244, 3251 (1984), without having to offer any justification at all beyond the tautology that a majority of Georgia's legislators might disapprove of the acts outlawed. This Court has long recognized, however, that "because the Bill of Rights is designed to secure individual liberty, it must afford . . . certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Id.* at 3250. So long as the sexual acts proscribed by Section 16-6-2

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the general public opinion of an earlier day that led Justice Harlan to take for granted the condemnation of homosexual practices, *see id.* at 546, 547, 552, 553, cannot justify criminalization of those practices today. In the quarter-century that has passed since Justice Harlan wrote, more than half the states in the Union have decriminalized private homosexual acts between consenting adults, *see* nn. 23, 49 *infra*, and our nation's professional societies have taken the position that such acts should not be condemned either by medicine or by law, *see* n. 51 *infra*.

take place in private and involve no children, commerce, or coercion,[15] they must be regarded as within the realm of just such relationships.

That sexual intimacy, even between unmarried persons and for purposes other than procreation, occupies this protected realm is evident from this Court's repeated vindication of the right to privacy in the context of contraception. Each time this Court has reviewed a criminal law that heavily burdened the decision to use contraceptive devices during sex, it has held that such a law must be subjected to heightened scrutiny — either for a close relationship to a compelling state interest, *see Carey* v. *Population Services Int'l*, 431 U.S. at 686, or at the very least for a fair and substantial relation to a legitimate state objective, *see Eisenstadt* v. *Baird*, 405 U.S. 438, 447-50 (1972). *See also Griswold* v. *Connecticut*, 381 U.S. 479, 485-86 (1965). As the State of Georgia would read them, these rulings protect not an intimate human relationship but only a narrow demographic decision: whether or not to increase the size of one's family.[16] But to read those decisions so narrowly is to ignore the basic values they protect.

To be sure, it is well established that, "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt* v. *Baird*, 405 U.S. at 453. There can thus be no doubt that our fundamental liberty entitles us to demand strong reason

[15] None of these proper objects of state concern are remotely involved here. *See* section II *infra*.

[16] *See* Brief of Petitioner at 19, 25.

when government would bar us from procreating,[17] or compel us to reproduce.[18]

But the right to control one's family size cannot by itself explain the protection this Court gave to the activities involved in the contraception cases. After all, *that* right can be vindicated, without any recourse to contraceptives, by simply refraining from sexual intercourse. No law of Connecticut, Massachusetts, or New York prohibited celibacy or abstinence as methods of avoiding childbirth. Rather, those states' laws were challenged and struck down because, by barring access to contraceptives, they imposed the onerous risks of disease and unwanted pregnancy on the very sexual relations that people otherwise wished to enjoy.[19]

This Court's privacy decisions thus do *not*, as petitioner would have it, concern only "marriage, the family, . . . and decisions as to whether through procreation the ancient cycles will begin again . . .."[20] Neither the right of access to contraceptive technology affirmed in *Eisenstadt* and *Carey*, nor the right to abortion services upheld in *Roe* v. *Wade*, 410 U.S. 113 (1973), was limited to married couples. Indeed, in *Eisenstadt* the Court declared that just such a distinction between married and single persons was unconstitutional. And the plaintiff in *Roe* was unmarried. These decisions thus did not revolve around "marriage" or "the family."

[17] *See, e.g., Griswold* v. *Connecticut*, 381 U.S. at 496-97 (Goldberg, J., concurring) ("Surely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born to them. . . . [S]uch totalitarian limitation of family size . . . is at complete variance with our constitutional concepts"); *see also Skinner* v. *Oklahoma*, 316 U.S. 535 (1942).

[18] *See, e.g., Roe* v. *Wade*, 410 U.S. 113, 152-53 (1973).

[19] *See, e.g., Eisenstadt* v. *Baird*, 405 U.S. at 448; *Carey* v. *Population Services Int'l*, 431 U.S. at 694-95 (plurality opinion); *id.* at 714-15 (Stevens, J., concurring in part and concurring in the judgment).

[20] Brief of Petitioner at 25.

Nor did they revolve around the "ancient cycles" of procreation. As this Court stressed in *Carey*, the constitutional principle of "individual autonomy" affirmed in *Griswold*, *Eisenstadt* and *Roe* protected not procreation, but the individual's "right of *decision*" about procreation, 431 U.S. at 687-89 (emphasis in original), and in each case this Court protected the decision to engage in sex *without* bearing or begetting a child. These holdings mandated heightened scrutiny not of state restrictions on procreative sex, but rather of restrictions on *non*-procreative sex — sex solely as a facet of associational intimacy — whether between married partners or between unmarried individuals.

The State of Georgia has failed to grasp that this Court's decisions upholding access to contraceptives involved not so much the right to buy and use a particular pharmaceutical product, as the right to engage in sexual intimacy as such. Put another way, decision-making about contraceptive use occupies a zone of presumptive protection from the state not just because it touches upon child-bearing, but also because it arises solely in the context of "a field that by definition concerns the most intimate of human activities and relationships" — namely, *sexual* activities and relationships. *Carey* v. *Population Services Int'l*, 431 U.S. at 685. And those activities and relationships do not lose that intimate status when engaged in for reasons other than procreation.

Nor should it be surprising that the state must provide substantial justification for interference in this zone. For it is one of the hallmarks of difference between our free society and a totalitarian one that our government cannot lightly trespass in the intimacies of our sexual lives — whether or not our conduct of those intimacies at any given moment involves a choice about conceiving a child. It would surely trigger strict judicial scrutiny, for example, if a state were to ban sexual relations between infertile couples, or by women past the age of meno-

pause, even though such a ban could have no impact at all on these individuals' decisions whether to bear or beget a child. In a free society it is not the business of government to intervene between two consenting adult sexual partners to dictate means or ends for their intimacy — *unless* the state can offer a special, particularized explanation for doing so.

The State of Georgia tacitly concedes this much with respect to intimate contacts between men and women in violation of the terms of Section 16-6-2, for the State throughout its brief attacks only the extension of the right of privacy to "*homosexual* sodomy."[21] For this reason alone, the ruling of the Eleventh Circuit should be affirmed, because Georgia has never explained why it need offer no justification for banning *heterosexual* sodomy, even though Section 16-6-2 proscribes specified physical contacts without regard to the gender of the individuals involved.

But particularized justification of the statute is also required insofar as the statute applies to intimate sexual contacts between persons of the *same* sex. For neither marriage nor procreative purpose is a prerequisite to demanding special justification when the criminal law would intrude into one's private physical relationships, as this Court's protection of unmarried heterosexuals using contraceptives makes clear. Nor can consensual homosexual contact in private any longer be deemed so transparently evil that a government need not explain its criminalization to any judicial authority. Surely no activity may be deemed self-evidently injurious in a nation where, as the State concedes,[22] more than half the states have decriminalized it.[23] *See, e.g., Loving* v. *Virginia*, 388 U.S. 1, 6 & n.5

[21] *See, e.g.*, Brief of Petitioner at 20, 21, 23, 24, 25, 26, 27, 29, 34, 36, 37, 38 (emphasis added).

[22] Brief for Petitioner at 23 & n.13.

[23] The vast majority of the American population lives in the 26 states that have decriminalized private, consensual, adult homosexual acts, either by legislative (Alaska, California, Colorado, Connecticut, Delaware, Hawaii,

(1967) (interracial marriage cannot be deemed immoral *per se* after being decriminalized by most states that once had banned it). Rather, the State that would criminalize such conduct has a burden of explanation: it must advance particular objects to which the law is well tailored, as the Eleventh Circuit required in the decision below.

B. Ordered Liberty Requires That The Private Home Be A Zone Free From Unjustified State Intrusion.

The State of Georgia contends that it may extend its criminal authority deep inside the private home without even offering any special justification. In so doing, the State ignores the fundamental principle, restated by the Chief Justice for the Court in *United States* v. *Orito*, 413 U.S. 139, 142 (1973), that "[t]he Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing and education."

In this case, as in *Payton* v. *New York*, 445 U.S. 573, 601

Illinois, Indiana, Iowa, Maine, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, South Dakota, Vermont, Washington, West Virginia, Wisconsin and Wyoming) or judicial means (New York, Pennsylvania and Massachusetts). Petitioner claims that 25 states still outlaw oral and anal sexual contacts, Brief for Petitioner at 23 & n.13, but its list of such jurisdictions erroneously includes the Commonwealth of Massachusetts, which has long since held its sodomy law unconstitutional as applied to the acts of consenting adults in private, *see Commonwealth* v. *Balthazar*, 366 Mass. 298, 318 N.E.2d 478 (1974).

Nor can the remaining division among the states on this issue be viewed simply as a benign patchwork of legislative experiments. For a state's prerogative to "serve as a laboratory, and try novel social and economic experiments," *New State Ice Co.* v. *Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), in its public sphere entails no comparable prerogative to conduct "'experiments at the expense of the dignity and personality' of the individual," *Poe* v. *Ullman*, 367 U.S. at 555 (Harlan, J., dissenting) (quoting *Skinner* v. *Oklahoma*, 316 U.S. at 546 (Jackson, J., concurring)). *See* section II *infra*.

(1980), "neither history nor this Nation's experience requires us to disregard the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." These traditions, given concrete form in the Fourth and Fourteenth Amendments, have "drawn a firm line at the entrance to the house." *Id.* at 590. When we retreat inside that line, the government must provide escalating justification if it wishes to follow, monitor, or control us there.

The Court has recognized this special protection in a variety of circumstances. Thus, the government must obtain a warrant to arrest a person at home — even if it would not need a warrant for an arrest on the street. *Id.* This is so notwithstanding "'historical acceptance' of warrantless entries to make felony arrests, both in the English common law and in the practice of many American States." *Id.* at 581.[24] For, as Justice Stevens wrote for the Court in *Payton*, "[i]n no [setting] is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home — a zone that finds its roots in clear and specific constitutional terms: 'The right of the people to be secure in their . . . houses . . . shall not be violated.'" *Id.* at 589.

More than the procedural protections of the Fourth Amendment are heightened when one goes home and shuts the door. Property rights in themselves "reflect society's explicit recognition of a person's authority to act as he wishes in certain areas." *Rakas* v. *Illinois*, 439 U.S. 128, 153 (1978) (Powell, J., concurring). The home not only protects us from government surveillance, but also "provide[s] the setting for those intimate activities that the Fourth Amendment is intended to shelter from governmental interference," *Oliver* v. *United*

[24] Even the "pure[st]" of "common law pedigree[s]" cannot ensure the continuing constitutional validity of long-practiced invasions of body or home. *Tennessee* v. *Garner*, 105 S.Ct. 1694, 1703 (1985). Thus the State of Georgia's lengthy recitation of instances where homosexuality has been disapproved in western history, Brief of Petitioner at 19-23, is beside the point.

States, 466 U.S. 170, 179 (1984).[25] This Court has thus held that, however free the state may be to ban the *public* dissemination of constitutionally unprotected obscene materials, the state cannot criminalize the purely *private* possession of such materials at home. *Stanley* v. *Georgia*, 394 U.S. 557, 559 (1969). For rights protected by other provisions of the Constitution "take[ ] on an added dimension" in the privacy of the home, given the "fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Id.* at 564. Thus, even though the First Amendment did not protect the material involved as such, this Court in *Stanley* observed that, "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Id.* at 565.

It would be ironic indeed if government were constitutionally barred, whatever its justification, from entering a man's home to stop him from obtaining sexual gratification by viewing an obscene film — but were free, without any burden of special justification, to enter the same dwelling to interrupt his sexual acts with a willing adult partner. The home surely protects more than our fantasies alone.

C. When Relationships Are Both Intimate In Kind *And* Insulated In The Home, There Is Double Reason To Demand Justification From Any Government That Would Root Them Out There.

In elaborating our right to privacy, this Court has long made clear that special sensitivity is required where, as here, govern-

[25] *See generally* Fried, *Privacy*, 77 YALE L.J. 475, 477-78 (1968) (physical privacy is as necessary to "relations of the most fundamental sort: respect, love, friendship and trust," as "oxygen is for combustion").

ment would intrude into the realm where the intimacy of human relationships and the privacy of the home intersect.[26] As Dean John Hart Ely explained over a decade ago, this Court's invalidation in *Griswold* of a statute regulating the use of contraceptives indicated an underlying concern that enforcement of the statute "would have been virtually impossible without the most outrageous sort of governmental prying into the privacy of the home."[27] Put another way by Justice Douglas, writing for this Court, Connecticut's contraceptive ban forced the question, "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?" *Griswold* v. *Connecticut*, 381 U.S. at 485. He had no hesitation in answering that such searches would be "repulsive." *Id.* at 486.[28]

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[26] In the words of two noted commentators, intimate sex between consenting adults in the privacy of the bedroom implicates two intertwined strands of the privacy right: an "autonomy right" and a "seclusion right." *See* Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563 (1977). While these authors disagree on whether a government might succeed upon review in justifying invasion of these combined rights through anti-sodomy laws, *see id.* at 596, they agree fully that invasion of these rights requires careful review for a justification "of some power," *id.* at 593.

[27] Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 929-30 (1973).

[28] To extend this analogy in the context of the Georgia statute at issue here would raise the even more "repulsive" prospect of searches not just of the bedroom, but of the body cavities themselves for "telltale signs" of oral or anal sexual contact. There can be no hesitation in concluding that such searches would violate "expectations of privacy and security of such magnitude that the intrusion [would] be 'unreasonable.'" *Winston* v. *Lee*, 105 S.Ct. 1611, 1616 (1985) (holding unreasonable under the Fourth Amendment a compelled surgical removal of a bullet from a suspect's chest). *See generally Rochin* v. *California*, 342 U.S. 165 (1952) (compelled stomach-pumping repugnant to fundamental notions of fairness). *Cf. Bell* v. *Wolfish*, 441 U.S. 520, 563 (1979) (Powell, J., dissenting in part) (even prison inmates, whose reasonable expectation of privacy is slight, are entitled to some meaningful state justification when they are subjected to the "serious intrusion on one's privacy occasioned by . . . anal and genital [body-cavity] searches").

This concern is more than a procedural one. Long before imposing upon the states a constitutional requirement that illegally seized evidence be suppressed, for example, no Member of this Court expressed any doubt that assertions of government power over the intimacy of the bedroom must trigger heightened judicial solicitude in the enforcement of the Due Process Clause. In *Irvine* v. *California*, 347 U.S. 128 (1954), although the Court was divided over whether the outrage of bedroom surveillance required reversal of a gambling conviction, no Justice disagreed with the dissenting observation of Justice Frankfurter that the action of police in planting a microphone in the Irvines' bedroom entailed "a more powerful and offensive control over the Irvines' life than a single, limited physical trespass could have entailed." *Id.* at 145. As Justice Douglas likewise observed, such an invasion of the bedroom "smack[s] of the police state, not the free America the Bill of Rights envisaged." *Id.* at 149 (Douglas, J., dissenting).

Nor would concern about government intrusion into the bedroom evaporate if Georgia's police were to obtain evidence of the acts listed in Section 16-6-2 by subtler means today.[29] For "[i]t would surely be an extreme instance of sacrificing substance to form were it to be held that the constitutional principle of privacy against arbitrary official intrusion comprehends only *physical* invasions by the police." *Poe* v. *Ullman*, 367 U.S. at 551 (Harlan, J., dissenting) (emphasis added). The substantive protection of the privacy of the home is what gives the express procedural guarantees of the Fourth Amendment their meaning. *See id.* at 549-51.[30] If judicial

[29] Respondent Hardwick, watched and seized in his own bedroom, was hardly the beneficiary of any such subtler means. *Cf. Payton* v. *New York*, 445 U.S. at 617 (White, J., dissenting) (police procedures must at a minimum "protect individuals against the fear, humiliation and embarrassment of being roused from their beds in states of partial or complete undress").

[30] As Justice Harlan wrote in dissent in *Poe* v. *Ullman*, "if the physical curtilage of the home is protected, it is surely as a result of solicitude to protect

application of the Bill of Rights is not to be reduced to an "arid ritual of meaningless form," *Staub* v. *Baxley*, 355 U.S. 313, 320 (1958), a Georgia citizen must be entitled to demand not only a warrant of the Georgia police officer who enters his bedroom, but also a justification of the Georgia legislature when it declares criminal the consensual intimacies he chooses to engage in there.

II. CLOSE SCRUTINY OF A LAW THAT CRIMINALIZES THE MOST PRIVATE OF RELATIONSHIPS WILL IN NO WAY ENDANGER LAWS THAT REGULATE THE PUBLIC SPHERE.

The State of Georgia labors long in its brief to establish a proposition Respondent has never denied: namely, that the protection of the *public* realm is a legitimate interest that may be advanced by state law.[11] This proposition, however, is wholly incapable of supporting Section 16-6-2. For that law bans all sexual contacts of a specified kind — even if conducted out of public view behind closed bedroom doors, even if engaged in by marriage partners or other fully consenting adults, and even if engaged in for love and not money. It thus intrudes the grasp of the criminal law deep into an area that implicates no state interest in protecting public sensibilities, nor in protecting vulnerable persons such as minors from possible coercion, nor in restricting commercial trade in activities offensive to public decency. All that Respondent argues is that the authority

the privacies of the life within." 367 U.S. at 551. By contrast, areas lying beyond the curtilage lack constitutional protection from government incursion because they "are unlikely to provide the setting for activities whose privacy is sought to be protected by the Fourth Amendment." *Oliver* v. *United States*, 466 U.S. at 179 n.10.

[11] *See* Brief of Petitioner at 34-39.

of government, undisputed here, to so regulate the *public* sphere does not extend with full force into every private bedroom in the land.

The decisions of this Court — including those petitioner would invoke — make clear that the traditional police power of government is limited in the private sphere in ways that it is not in the public. As the Chief Justice observed in *United States* v. *Orito*, 413 U.S. at 142, "It is hardly necessary to catalog the myriad activities that may be lawfully conducted within the privacy and confines of the home, but may be prohibited in public."[12] It may thus make all the difference *where* the state seeks to regulate such personal conduct — including sexual activities. As the Chief Justice wrote for the Court in *Paris Adult Theater I* v. *Slaton*, 413 U.S. 49, 67 (1973), for example, a married couple's right to engage in unfettered sexual relations in their bedroom affords no protection to a sexual embrace at high noon in Times Square. *See also id.* at 66 n.13. Conversely, the state's power to ban the showing of obscene films to consenting adults in a theater open to anyone with the price of a ticket, *see id.*, entails no comparable power to criminalize the possession and enjoyment of the very same obscene material in the privacy of the home, *see Stanley* v. *Georgia*, 394 U.S. at 559, 565. And government power to zone live "adult" entertainment restrictively, *see Schad* v. *Borough of Mt. Ephraim*, 452 U.S. 61, 71-72, 76 (1981), or to dictate that nude dancing shall not accompany the serving of alcohol in restaurants or public houses, *see California* v. *LaRue*, 409 U.S. 109 (1972), hardly implies

[12] The Chief Justice explained in *Paris Adult Theater I* v. *Slaton*, 413 U.S. 49, 65 (1973), that "[t]his privacy right encompasses and protects the personal intimacies of the home . . . [citing] *Stanley* v. *Georgia* . . .." *See id.* at 66 n.13 ("The protection afforded by *Stanley* v. *Georgia* is restricted to a place, the home").

similar authority to tell citizens how to dress when entertaining guests or serving drinks in their own homes.

Nor should it be surprising that, in the kind of society contemplated by our Constitution, government must offer greater justification to police the bedroom than it must to police the streets. For the zoning power confers only the most limited governmental authority over decisions governing lifestyle within the home. *See, e.g., Moore* v. *City of East Cleveland*, 431 U.S. at 518-19 (Stevens, J., concurring in judgment).[33] Even in *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974), in upholding a zoning law that excluded all but families from residence in a municipality, this Court stressed that the law stopped short of prohibiting unmarried couples from living together, *see id.* at 8, and in no way regulated who could be entertained by householders, or how, within their homes, *see id.* at 9. In short, contrary to the State of Georgia's contentions, this Court has never held that the public environment pervades every private bedroom nor encompasses every intimacy. The latter occupy a specially protected domain.

Heightened scrutiny of Section 16-6-2 will thus in no way entail any closer review of laws regulating the community environment. Indeed, even if Section 16-6-2 were to be invalidated on remand, the State of Georgia would retain on its books criminal laws banning public indecency,[34] prostitution,[35] pimping,[36] and pandering.[37] Because these activities, unlike the

[33] *See also* R. Epstein, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 109 n.4 (1985) ("the notion of private property is designed to exclude [moral] judgments about the conduct of others," particularly judgments by moral consensus that certain "activities . . . are unworthy in themselves even if they cause no harm to others").

[34] O.C.G.A. Section 16-6-8.

[35] *Id.* Section 16-6-9.

[36] *Id.* Section 16-6-11.

[37] *Id.* Section 16-6-12.

private activities for which Respondent seeks protection, involve society's public spaces and commercial exchanges, nothing in an affirmance here would remotely require of these laws any more than a rational relationship to public decency.[38]

Nor of course does affirmance here entail any heightened scrutiny of criminal statutes protecting unconsenting citizens — including children — from sexual force or coercion. Should Section 16-6-2 be struck down on remand, Georgia would remain fully equipped to prosecute rape,[39] forcible sodomy,[40] statutory rape,[41] and child molestation.[42] These statutes are transparently related to the state's fundamental duty to shield

[38] The State of Georgia's innuendo that this case has some bearing on the regulation of sex in "public parks, restrooms, 'gay baths,' and 'gay bars,'" *see* Brief of Petitioner at 36-37, is thus incomprehensible. Even if the State's imaginative recasting of the 30 million Americans who comprise our homosexual population as a furtive criminal underclass, *see id.*, had the slightest basis in fact, rather than in irrational fear and prejudice, *cf. City of Cleburne* v. *Cleburne Living Center*, 105 S.Ct. 3259, 3260 (1985); *id.* at 3262 (Stevens, J., concurring), the State appears to have missed the point that nothing in Respondent's argument claims any special protection for sexual activity — homosexual or heterosexual — in our society's public squares or commercial establishments.

[39] O.C.G.A. Section 16-6-1.

[40] *Id.* Section 16-6-2(a) ("aggravated sodomy"). The State of Georgia mistakenly reads this Court to have "indicat[ed] in *Rose* v. *Locke*, 423 U.S. 48, 50 n.3 (1975), that the act of cunnilingus is not considered to involve a fundamental right." Brief of Petitioner at 24; *see also id.* at 15. What the Court said, however, is simply that no fundamental right is implicated in a case where that sexual act is imposed by force at the point of a "butcher knife." *Id.* at 48. Respondent could hardly agree more with that holding. But the *forcible* sodomy provision of Section 16-6-2 is more than adequate to support prosecution of such brutal conduct, even if the part of that statute challenged here were struck down.

[41] *Id.* Section 16-6-3.

[42] *Id.* Section 16-6-4.

us from harms wrought by others — a concern wholly absent in the case of consensual adult sexual conduct.[43]

Likewise, affirmance here does not entail any closer scrutiny of criminal laws against adultery or polygamy. For unlike Section 16-6-2 — which defines a "crime" in terms of the anatomical parts involved, not in terms of any relationships violated — these laws protect the estate of monogamous marriage. Marriage, unlike other manifestations of intimate association, is a contract controlled by the state, and, like "any other institution," it is "subject to the control of the legislature." *Maynard* v. *Hill*, 125 U.S. 190, 205 (1888).[44] Thus close scrutiny of state intrusion upon private, consensual, noncommercial sexual acts, such as the intrusion which Hardwick challenges, does not suggest similar scrutiny of laws that would restrain those who have entered marriage contracts from violating those agreements.[45]

In short, the State of Georgia's suggestion that affirmance in this case will somehow confer colorable privacy claims on those who would defend their right to engage, against their states' criminal laws, in "such acts as prostitution, suicide,

[43] Nor does this case implicate in any way state laws enacted to protect us from self-inflicted harms — by requiring us to wear seatbelts, by forbidding us to use dangerous drugs, or otherwise. Respondent obviously does not contend that the Fourteenth Amendment enacted John Stuart Mill's ON LIBERTY, any more than it enacted Herbert Spencer's SOCIAL STATICS. *See Lochner* v. *New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[44] Respondent Hardwick, of course, claims no right whatever to have any homosexual relationship recognized as a marriage. But the power of the state to place conditions on a marriage that individuals choose to enter into and maintain in no way entitles the state to impose even a financial barrier, much less a criminal sanction, on an individual's right *not* to be married if he or she so chooses. *Boddie* v. *Connecticut*, 401 U.S. 371, 383 (1971).

[45] Section 16-6-2 is obviously not limited to adulterous or polygamous sodomy; rather, it sweepingly criminalizes acts even between marriage partners or between two unmarried people.

voluntary self-mutilation, and bigamy"[46] is without the slightest foundation. Affirmance in this case would provide no basis to require close scrutiny of such laws, much less to undermine the legitimacy of their purposes.

Finally, affirmance here will in no way compel close scrutiny of any *non*criminal laws that might favor certain sexual unions over others. For as Justice Harlan wrote in *Poe* v. *Ullman*, the standard of judicial scrutiny when the state seeks to codify public morality may vary with the state's "*choice of means*." 367 U.S. at 547 (emphasis in original). Thus the state may seek to discourage the use of contraceptives by granting tax subsidies and be subject only to minimal scrutiny, but it may not, without more compelling justification, wield the bludgeon of criminal sanctions against such conduct. *Id.* at 548. Likewise, the state may, without having to answer to a court, "make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds," *Maher* v. *Roe*, 432 U.S. 464, 474 (1977), but it may not, without powerful reason, criminalize abortion, *Roe* v. *Wade*. There is thus no cause for worry that affirmance of the decision below — which mandates heightened scrutiny only of a *criminal* law that would police the most intimate of relations in the most private of enclaves — would cast doubt on any administrative programs that states might fashion to encourage traditional heterosexual unions.

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[46] Brief for Petitioner at 28; *see also id.* at 32-33.

III. THE STATE HAS ADVANCED NO LEGITIMATE GOAL TO WHICH SECTION 16-6-2 BEARS EVEN A FAIR OR SUBSTANTIAL RELATION, MUCH LESS A CLOSE FIT.

The State of Georgia has put forward one reason and one reason only why it believes Section 16-6-2 valid: namely, the tautology that, inasmuch as homosexual sodomy offends "traditional moral values,"[47] the State has "declared [such conduct] to be morally wrong."[48] Even if the vindication of morality *per se* were the sort of reason that could properly justify banning consensual adult sex in the privacy of the home, there is no moral consensus against the conduct proscribed by Section 16-6-2. Indeed, such conduct has been systematically decriminalized by half the States in the thirty years since the authors of the Model Penal Code first urged that result.[49] Surely the sincerity of the State's claim that Section 16-6-2 implements universal morality is thrown into grave doubt by the fact that state after state has found it possible to preserve traditional norms without intruding its criminal law into the no less traditional inner sanctum of the private bedroom.[50] Moreover,

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[47] Brief of Petitioner at 36; *see id.* at 38.

[48] *Id.* at 27.

[49] MODEL PENAL CODE Section 213.2; Article 207.1, Comment. The American Law Institute first proposed decriminalization in 1955. Two states repealed their "sodomy" laws in the 1960s, 20 more followed suit in the 1970s, and one more has done so in this decade. *See* Rivera, *Book Review of Sexual Politics, Sexual Communities*, 32 U.PA.L.REV. 391, 410 (1984); see n. 23 *supra*. In three additional states, sodomy laws have been held unconstitutional as applied to private, consensual, noncommercial sexual acts. *See* Rivera, *supra* at 410.

[50] *Cf. City of Cleburne* v. *Cleburne Living Center*, 105 S.Ct. at 3258-60; *Zobel* v. *Williams*, 457 U.S. 55, 61-63 (1982); *United States Dept. of Agriculture* v. *Moreno*, 413 U.S. 528, 534-35 (1973).

the nation's major scientific and professional associations,[51] as well as a host of religious organizations,[52] have officially declared their opposition to state regulation of private adult sexual conduct by force of criminal sanction.

To be sure, vindicating the supposed morality of the majority might be a sufficient justification if Georgia were here banning prostitution on its streets or zoning obscene movie theaters away from its downtowns. As this Court stressed in *Paris Adult Theater*, no requirement of empirical justification need be offered when a state or city seeks to pursue a particular moral or even aesthetic vision in designing and policing its local public environment. 413 U.S. at 62-63. But Section 16-6-2 is in no way directed at such regulation of public life. Because Section 16-6-2 is instead directed at intimate relations however private, and thus slices deeply into the sanctity of the home, this law cannot be defended, as a zoning statute might be, by "the mere assertion that the action of the State finds justification in the controversial realm of morals." *Poe* v. *Ullman*, 367 U.S. at 545 (Harlan J., dissenting).

Rather, this law can be defended only if it can be shown to serve closely some state objective *other than* the bald assertion

[51] Resolution of the Council of Representatives of the American Psychological Association (1975); Resolution No. 7514 of the American Public Health Association (1975); Resolution of the American Bar Association House of Delegates, Summary of Action at 23 (August 1975); Resolution adopted in lieu of Report I by the American Medical Association House of Delegates, Annual Meeting Report at 84 (1975); Policy Statement of the Delegate Assembly of the National Association of Social Workers (1977).

[52] These groups include the National Council of Churches, the Union of American Hebrew Congregations, the National Federation of Roman Catholic Priests' Councils, the Lutheran Church of America, the United Church of Christ, the Methodist General Conference, the United Presbyterian Church, the Episcopal Church, the American Baptists, and the Society of Friends. Hiltner, *Homosexuality And The Churches*, in HOMOSEXUALITY: A MODERN REAPPRAISAL (1980); PRESBYTERIAN BLUE BOOK I & II: REPORT ON THE CHURCH AND HOMOSEXUALITY (1978).

of one possible moral view.[53] Accordingly, the judgment below must be affirmed, for it simply instructed the district court to test the law under a standard sufficiently searching to expose the empirical or other premises the State may claim underlie it. Whether the State can justify its law under such scrutiny need not be decided here, but should be resolved first by the courts below.

Only then may the untried questions of fact to which Georgia alludes in its brief become relevant. For example, the State's allusions to the transmission of disease through anal or oral sexual contact[54] are wholly inapposite here, where the only issue is the relevant standard of review, *not* the validity of Section 16-6-2. Conceivably, such considerations might be introduced on remand, if scientifically supportable,[55] as a possible *post hoc* rationalization for a law Georgia has until now sought to defend solely as the morals measure it was when first enacted. If so, it would then be incumbent on the State to explain how a threat of criminal prosecution could serve as an effective public health measure, rather than driving underground the very information that medical authorities need most, by fostering fear that a visit to a doctor will mean prison for the patient.[56]

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[53] *Cf. Roe* v. *Wade*, 410 U.S. 113, 162 (1973) ("we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake").

[54] *See* Brief of Petitioner at 37.

[55] The scientific controversy over AIDS would make it wholly inappropriate, as well as premature, for this Court to take judicial notice of such matters.

[56] *See, e.g., Baker* v. *Wade*, 106 F.R.D. 526, 530, 531 (N.D. Texas 1985) ("'to criminalize homosexuality is possibly the worst conceivable way to try and solve the problem of AIDS' because this simply serves 'to drive the whole issue underground, so that surveillance and early diagnosis will be made that much more difficult, if not impossible'"; criminalizing homosexual conduct in order to combat AIDS "'would be a public health disaster'"); *New Jersey* v.

Likewise, should the State seek to support the law as necessary to deter its citizens from defecting to a homosexual lifestyle,[57] it will have to meet a double burden of showing first, how a statute indiscriminately banning both homosexual *and* heterosexual sodomy could possibly be related to such a goal, and second, why such a deterrent is necessary if traditional moral values affirmed by the people of Georgia oppose homosexuality, as the State has asserted before this Court.[58] Finally, if little such deterrent effect could be demonstrated, for example because homosexuality is an immutable characteristic,[59] the State would be hard pressed to defend the law. For symbolism alone is surely an insufficient basis. *Cf. Carey* v. *Population Services Int'l*, 431 U.S. at 715 (Stevens, J., concurring). And if the law were a vehicle only for sporadic and discretionary enforcement, serious questions of due process and equal protection would be raised.[60]

All of these however, remain questions appropriate not here but on remand, as the Eleventh Circuit rightly held. That court

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Saunders, 75 N.J. 200, 381 A.2d 333, 341-42 (1977) ("[The fornication statute] is counterproductive. To the extent that any successful program to combat venereal disease must depend upon affected persons coming forward for treatment, the present statute operates as a deterrent").

[57] *See, e.g.*, Brief of Petitioner at 37 (alluding to supposed appeal of homosexuality to adolescents).

[58] In a democracy such as ours, delicate issues of private morality are perhaps best nurtured by our families and churches, rather than by the state. *See Poe* v. *Ullman*, 367 U.S. at 521-22 (Douglas, J., dissenting) (noting that in democratic states, unlike totalitarian ones, subcommunities such as family and church flourish independent of state control).

[59] When the American Psychiatric Association removed homosexuality from its list of "diseases" in 1973, it had concluded after long study that homosexual orientation was not something "treatment" could change. *See* Resolution of the American Psychiatric Association (December 15, 1973).

[60] *See, e.g., Kolender* v. *Lawson*, 461 U.S. 352 (1983); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886).

simply recognized "what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement." *Poe* v. *Ullman*, 367 U.S. at 543 (Harlan, J., dissenting). That government must submit to such scrutiny when it would reach deeply into our homes and private lives is simply a feature of our system of ordered liberty.

CONCLUSION

For these reasons, the judgment of the Eleventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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